Filed 2/3/05 Kephart v. Flextronics International CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LILY KEPHART, Plaintiff and Appellant, v. FLEXTRONICS INTERNATIONAL, LTD., et al., Defendants and Respondents.	H025957 (Santa Clara County Super. Ct. No. CV802133)

Plaintiff Lily Kephart brought this action against her employer and certain associated businesses, asserting among other things that they had wrongfully induced her to leave her previous employment by promising benefits equal to those she had enjoyed there. She alleged that this conduct caused her to suffer financial and other burdens after she was rendered quadriplegic in an automobile accident and received benefits inferior to those she would have received in her previous job. The trial court granted defendants' motion for summary judgment on the ground that plaintiff's claims were preempted by ERISA, the Employment Retirement Income Security Act of 1974, 29 U.S.C. section 1001, et seq. We have concluded that defendants' motion was in actuality an attack on plaintiff's claims *as pleaded*, that the evidence before the court established plaintiff's

ability to plead additional claims which might well avoid the bar of federal preemption, and that the matter should therefore have been treated as a motion for judgment on the pleadings and granted with leave to amend. Accordingly, we will reverse the judgment with directions to enter such an order.

FACTUAL AND PROCEDURAL BACKGROUND

I. *The Pleadings*

Plaintiff filed her complaint on October 11, 2001. She alleged that she had been employed by Skyway Freight Systems from 1990 to 1999 as an administrative assistant. For about the last five years of this time she worked for Skyway's president and chief executive officer, William Tarbox. In March 1999, Tarbox left Skyway to become the president of the new West Coast office of defendant Irish Express Logistics, Inc. (IEL), a Tennessee corporation wholly owned by defendant Flextronics International, Ltd. (Flextronics), a Singapore corporation with its principal American place of business in San Jose.[1] Shortly after taking this post, Tarbox "asked Ms. Kephart to leave Skyway and join him at [IEL]." She replied that "she was the sole provider of medical and health care insurance for her family, and that she would only consider working with him at [IEL] if defendants would provide medical benefits for Ms. Kephart and her family, that were the same as, or better than those provided to her through Skyway." Defendants, with "full knowledge of the benefits provided by Skyway," promised that they "would provide her with medical benefits that were the same as, or better than those provided her through Skyway."

Plaintiff alleged that, in reliance on these promises, she left Skyway and was hired by defendant Century II Staffing USA, Inc. (Century), a Tennessee consulting firm with

[1] Flextronics asserts without record citation that IEL has changed its name to "Flextronics Logistics, Inc." Since there is little occasion to distinguish among the defendants for purposes of this appeal, we will not concern ourselves with questions of nomenclature.

which IEL had contracted "for human resource services, including hiring employees, payroll, insurance benefits, worker's compensation coverage, unemployment insurance and overtime pay." Defendants thereafter provided a plan of medical insurance, the Gold Plan, which "did not have the same benefits that were provided to [plaintiff] by her insurance at Skyway." When she apprised Tarbox of the Gold Plan's inadequacies, defendants "ratif[ied] the promises made to Ms. Kephart, and subsequently reaffirmed their commitment to provide her with medical benefits that were the same as or better than those provided to her at Skyway."

In October 1999, plaintiff alleged, she was involved in an auto accident rendering her quadriplegic and requiring "constant and continuing medical care." Afterwards she filed a claim under the Gold Plan and, upon receiving a letter of denial, was "shocked to realize that defendants had not provided her with the benefits they had promised."

In her first and second causes of action plaintiff alleged that, on or about April 13, 1999, defendants made an oral contract, or a promise enforceable by virtue of estoppel, by which they bound themselves to "provide Ms. Kephart with medical and health care benefits that were the same as or better than the benefits Ms. Kephart was provided by Skyway." Defendants breached this undertaking, plaintiff alleged, by "failing to provide Ms. Kephart with medical and health care benefits that were equal to or better than the benefits she was provided by Skyway."

In her third cause of action plaintiff charged intentional misrepresentation, i.e., fraud, in that during the negotiations preceding her hiring by defendants, "Tarbox and Ms. Kephart discussed the terms and conditions of her job, including vacation time, life insurance benefits, 401(k), and other related benefits. At this time, Ms. Kephart explicitly communicated to Tarbox that she was the sole provider of medical and health care insurance to her family, and would only accept the offer with [IEL] if guaranteed medical benefits that were the same as, or better than those provided to her by Skyway." Defendants "made the fraudulent representation that in exchange for coming to work for

[IEL], defendants would provide Ms. Kephart with the same, or better benefits than those she was receiving at Skyway." In justifiable reliance on these representations, she left Skyway and accepted a position with IEL on or about April 14, 1999. After she began work she "notified defendants that the benefits provided to her were not" as good as those at Skyway, whereupon defendants "fraudulently represented to Ms. Kephart that they would work with her to improve the benefits package." The fourth and fifth causes of action alleged variations on this theory consisting of negligent misrepresentation and false promise, respectively.

In her sixth cause of action plaintiff alleged that defendants breached the covenant of good faith and fair dealing by "fail[ing] to make any reasonable efforts to provide Ms. Kephart with medical benefits that were as good as or better than those provided to her at Skyway."

Defendants did not demur to the complaint, but filed answers generally denying its allegations and pleading affirmative defenses including that plaintiff's claims were preempted, in whole or part, by ERISA.

II. *Summary Judgment*

In December 2002, Flextronics and IEL filed a motion for summary judgment, in which Century filed a joinder, asserting that "[ERISA] . . . pre-empts each and every one of plaintiff's causes of action . . . ." The supporting argument was predicated entirely on the proposition that the Gold Plan, by which defendants provided medical benefits to plaintiff, was "an employee benefit plan under the provisions of ERISA."

In her written opposition to the motion, plaintiff contended that although the Gold Plan was a covered benefits plan for purposes of ERISA, her claims did not " 'relate to' " that plan for a number of reasons, including that federal caselaw had substantially narrowed the range of ERISA preemption and that the Gold Plan was not in effect when the misrepresentations were made to her. She also contended that by concentrating exclusively on the Gold Plan, defendants relied on an "overly restrictive" reading of the

complaint. Plaintiff asserted that her claims embraced false promises not only of medical benefits but also of adequate "life insurance, a 401(k) plan, and long-term disability insurance."

Plaintiff's opposition included a table, previously produced to defendants in discovery and not objected to by them on summary judgment, in which she compared the benefits provided by defendants to those provided by plaintiff's previous employer. One entry showed that plaintiff's previous employer had provided "long term disability/pension payments" of "2/3 annual salary until age 65," while defendants allowed "full salary first 6 months[,] 2/3 annual salary 2nd 6 months[,] [and] 1/2 annual salary 1 year to 2 years after accident." Plaintiff asserted that defendants' payments did not reflect an ERISA "benefit plan" at all, but were a "one-time obligation" that was "based on a fixed, one-time-only calculation." Also included in plaintiff's opposition, and not objected to by defendants, was a copy of an apparent letter on the letterhead of "Irish Express Cargo Limited," located in Dublin, Ireland.[2] The letter bore the date of November 19, 1999, and the apparent signature of one Deirdre Gilbin as "Corporate Human Resources Manager." After wishing plaintiff continued progress, the letter stated: "The disability benefit provided by the company is as follows: [¶] • 6 months with full pay. [¶] • 6 months with 2/3 of normal pay. [¶] • 12 months with 1/2 of normal pay. [¶] At the end of the 24 months, we will then review the situation if necessary." Plaintiff declared that no payments were made after the two-year period described in this letter.

---

[2] Defendants now object strenuously to this document, stating in their brief that they "filed a written evidentiary objection" to it "in the court below . . . based on the arguments that it was hearsay and not authenticated." No citation to the record is supplied, perhaps because no such objection appears. The letter was submitted as Exhibit E to plaintiff's declaration in opposition to summary judgment. Defendants' written objections include references to other exhibits, but not this one. Any objection has therefore been waived. (Code Civ. Proc., § 437c, subd. (b)(5).)

Plaintiff argued that her complaint was framed broadly enough to include claims relating to disability benefits, but that if the court did not agree, she was entitled to amend to clearly plead such claims. At the hearing on the motion for summary judgment, plaintiff's counsel suggested that if the court found the complaint inadequate to raise issues about false promises of disability and other benefits, the court should treat the motion as one for judgment on the pleadings. The court declared itself unable to do so, and concluded the hearing.[3] It issued an order granting summary judgment, in which it alluded to, but did not address, plaintiff's arguments concerning disability benefits. In a subsequent order denying plaintiff's motion for new trial, the court concluded among other things that "[t]here was no basis for treating the motion as one for judgment on the pleadings."

The court entered judgment for defendants. Plaintiff filed this timely appeal.

DISCUSSION

I. *Summary Judgment as Judgment on the Pleadings*

Defendants' motion rested on the premise that the only claims properly before the court were those based on false or unperformed promises to provide plaintiff with

---

[3] "MR. McMANIS: [¶] . . . [¶] In addition, Your Honor, there were other benefits promised to her that had nothing to do with ERISA plans. These, of course, are factual issues that should be decided by a jury, not on summary adjudication. [¶] But even if you have some doubt about the medical benefits aspect of the case, there are many, many other benefits that were promised her, specifically disability benefits, which had nothing to do with an ERISA plan. Now we're taken to task by the defense counsel because there's some suggestion that our Complaint isn't as clear as it might be. If the Court's concerned about that suggestion, I think this motion should be treated as a motion for judgment on the pleadings.

"THE COURT: I can't do that.

"MR. McMANIS: Well—

"THE COURT: Okay. I want to check one thing. My inclination is to grant the motion. I'm going to take it under submission and take a look at something, and I'll have a written order out this afternoon. Okay. Thank you."

medical benefits equal to those on her previous job. Defendants contended that any claim predicated on such a promise was preempted by ERISA, because the medical plan under which plaintiff ultimately received benefits—the Gold Plan—was "an employee benefit plan under the provisions of ERISA." However, plaintiff never disputed the premise that the Gold Plan was an employee benefit plan. Indeed, that fact appeared affirmatively from the complaint, and particularly plaintiff's allegation that defendants had provided her "with *medical and health care insurance* (hereinafter the 'Gold Plan')." (Italics added.) ERISA defines "employee benefit plan" to include "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, *through the purchase of insurance* or otherwise, . . . *medical, surgical, or hospital care or benefits*, or benefits in the event of sickness, accident, disability, death or unemployment . . . ." (29 U.S.C. § 1002(3), (1), italics added.) The prima facie applicability of ERISA to the Gold Plan was thus manifest on the face of the complaint.

The only real question before the court with respect to the Gold Plan was whether plaintiff's claims "related to" that plan for purposes of ERISA preemption. (29 U.S.C. § 1144(a).)[4] This was a question of law. (*Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan* (9th Cir. 1989) 874 F.2d 683, 684.) Defendants' argument on this pivotal point depended explicitly on the allegations of the complaint, not on extrinsic or disputed matters. Defendants' moving papers stated their core position as follows: "[P]laintiff has *asserted* as the basis for all six of her causes of action that she was promised that the medical benefits she would receive as an employee of defendants

[4] "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." (29 U.S.C. § 1144(a).)

would be 'the same as, or better than those provided by Skyway [her prior employer].' *Complaint, ¶¶ 10, 18, 24, 32, 40, 46, 55.* In other words . . . , plaintiff here is *asserting* that she was promised a certain level of benefits and that she was not provided with that level of benefits. The law is clear that this is exactly the type of case that ERISA is intended to and does in fact preempt. Thus, ERISA preempts plaintiff's claims in all of her causes of action that she should have received a level of benefits that she did not [*sic*], and the Flextronics Defendants are accordingly entitled to summary judgment as a matter of law." (Italics added.)

For at least 40 years it has been the rule in this state that when a defendant's motion for summary judgment depends on the untenability of the plaintiff's case *as pleaded*—and not on extrinsic evidence negating an element or proving an affirmative defense—it will be treated as a motion for judgment on the pleadings.[5] (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117-1118; *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1491; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663; *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1817; *Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 234.) If the motion is well taken—i.e., if the complaint fails on its face to state a viable cause of action—the usual and preferred practice is to "grant the motion with leave to amend and, after the issues have been properly plead[ed], to renew the motion for summary judgment." (*Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113, 1120; cf. *Stolz v. Wong Communications Limited Partnership*, *supra*, 25 Cal.App.4th at p. 1817.)

---

[5] Until 1993, the procedure for judgment on the pleadings was entirely a creature of caselaw. (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1447.) In that year the Legislature adopted Code of Civil Procedure section 438, providing a statutory procedure for judgment on the pleadings. We see no respect in which the statute might alter our analysis here, and the parties have suggested none.

Plaintiff expressly requested such treatment at the hearing on summary judgment here, but the trial court below apparently concluded that it was categorically unavailable, saying simply, "I can't do that." This cryptic declaration was illuminated to some extent in the court's order denying new trial, where it wrote that "[t]here was no basis for treating the motion as one for judgment on the pleadings," because "defendants' motion was based on establishing the affirmative defense of preemption under ERISA, and was thus not an attack on the sufficiency of the pleadings."

The court's ruling thus appears to rest on a supposed dichotomy between the assertion of an affirmative defense, on the one hand, and "an attack on the sufficiency of the pleadings," on the other. These phenomena are not mutually exclusive. A defense motion for judgment on the pleadings, like a general demurrer, tests the facial viability of the plaintiff's claims as pleaded in the complaint. Any state of facts that bars relief will, if apparent on the face of the complaint, support judgment on the pleadings. This of course includes the failure to plead a "material and necessary allegation." (*Seidner v. 1551 Greenfield Owners Assn.* (1980) 108 Cal.App.3d 895, 903.) But it also includes the positive disclosure of facts establishing an affirmative defense. (See *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420-1421 ["Although privilege is typically asserted as an affirmative defense, it may be raised by general demurrer where the existence of privilege appears from the face of the complaint"]; *id.* at p. 1421, quoting Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 7:49, pp. 7-24 to 7-25 [" 'A general demurrer will lie where the complaint "has included allegations that *clearly* disclose some defense or bar to recovery" ' "]; see *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 181 [directing trial court to sustain demurrer without leave based on statutory immunity; "The grounds for the demurrer were that the face of the complaint showed that an affirmative defense barred plaintiff's claim against defendant"]; *H & M Associates v. City of El Centro* (1980) 109 Cal.App.3d 399, 405 [privilege and justification, as affirmative defenses, will not support

order sustaining demurrer "unless apparent upon the face of the complaint"]; *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, 19, quoting *Herron v. State Farm Mutual Ins. Co.* (1961) 56 Cal.2d 202, 207 [same, justification]; *CrossTalk Production, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635 [unclean hands].)

This principle—that an affirmative defense can be raised by demurrer or judgment on the pleadings when it appears on the face of a complaint—has been applied by California courts numerous times to defenses arising under federal law. (See *Samuel v. Stevedoring Services* (1994) 24 Cal.App.4th 414, 422 ["if the federal immunity is apparent from the face of the complaint, a defendant may file a motion for judgment on the pleadings"]; *Pauletto v. Reliance Ins. Co.* (1998) 64 Cal.App.4th 597, 599 [affirming judgment on demurrer based on preemption by federal bankruptcy law]; *Duggal v. G.E. Capital Communications Services, Inc.* (2000) 81 Cal.App.4th 81, 84, 87-88, 94 [affirming judgment on demurrer based on preemption by federal " 'filed rate doctrine' "]; *Cobos v. Mello-Dy Ranch* (1971) 20 Cal.App.3d 947, 950-951, 952 [affirming judgment on demurrer based on preemption by federal immigration law]; *McCormick v. Travelers Ins. Co.* (2001) 86 Cal.App.4th 404, 407 [affirming judgment on pleadings based on exclusive federal jurisdiction].)

In discussing its refusal to view the matter as a motion for judgment on the pleadings, the court below also cited defendants' presentation of extrinsic evidence, writing that "[t]he parties presented evidence regarding the issue of whether or not the claims raised in the pleadings, which otherwise stated causes of action, were 'related to an employee benefit plan' and thus preempted." As we have seen, however, any evidence bearing on this question was superfluous, since defendants' argument that plaintiff's claims "related to" the Gold Plan rested entirely on matters on the face of the complaint. A party launching what is in substance a challenge to the pleadings—a challenge that, if successful, would ordinarily entitle the opposing party to amend—cannot convert it into an entitlement to final judgment by the simple expedient of labeling

the proceeding a motion for summary judgment and submitting declarations pointlessly reiterating matters judicially admitted by his opponent.

This is precisely such a case. The defect asserted by defendants appeared, if at all, on the face of the complaint. Defendants' supporting proofs added nothing to the issues presented for disposition. The matter therefore was eligible for treatment as a judgment on the pleadings, and the trial court's erroneous supposition to the contrary cannot sustain the judgment.

II. ***Leave to Amend***

Defendants make no attempt to defend the trial court's disclaimer of power to treat the matter as judgment on the pleadings, but instead contend that the judgment is correct for other reasons. They thus implicitly invoke the principle that even where a judgment on the pleadings rests on erroneous reasoning, it will be sustained—as will any other order—if the ruling itself was clearly correct. (E.g., *Ott v. Alfa-Laval Agri, Inc., supra,* 31 Cal.App.4th at p. 1448, citing 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 259, p. 266 ["Although we conclude reasons in support of the trial court's ruling are erroneous, we affirm the grant of judgment on the pleadings . . . . [W]e review the trial court's disposition of the matter, not its reasons for the disposition"].)

Defendants contend that the judgment here was correct, first, because "[a]ppellant never sought or moved to amend her Complaint." It is true that plaintiff did not *formally move* for leave to amend. However, it is not accurate to say that plaintiff "never sought" such leave. In the memorandum opposing summary judgment, plaintiff's counsel wrote that if the court found the complaint insufficient to raise a claim based on falsely promised disability benefits, plaintiff was entitled to amend her complaint to clarify her intent to assert such a claim.[6] In their written reply, defendants acknowledged plaintiff's

[6] Plaintiff's counsel wrote: "If this Court does not agree with the broad interpretation of plaintiff's claims, then plaintiff is entitled to leave to amend her pleading to include all of the benefits plans promised to plaintiff by defendants. That a motion for

assertion that "she could cure any deficiencies in her opposition to this motion by amending the pleading," but urged the court to "reject this backward attempt to amend the Complaint" because plaintiff had not formally moved to amend and because defendants would suffer unspecified prejudice if amendment were allowed. As defendants thus acknowledged below, plaintiff in her points and authorities had in fact "sought," if only "backward[ly]," to amend.

Further, at the hearing on the motion for summary judgment, plaintiff's counsel explicitly asked the court to treat the matter as a motion for judgment on the pleadings. That request necessarily implied a desire and willingness to amend the complaint. It also invoked the principles and authorities we have discussed above, which operate independently of any general requirement that a plaintiff opposing summary judgment on grounds outside the pleadings expressly pray for leave to amend.[7]

In short, while plaintiff did not formally move to amend her complaint, she plainly communicated her desire to do so should the court find the complaint insufficient to

---

summary judgment is pending does not prevent plaintiff from seeking leave to amend. *See Honig v. Financial Corp. of America* (1992) 6 Cal.App.4th 960, 965 ('Motions to amend are properly granted as late as the first day of trial or even during trial if the defendant is alerted to the charges by the factual allegations, no matter how framed and the defendant will not be prejudiced.') (internal citations omitted)."

[7] We recognize the distinction between (1) a situation in which the complaint alleges a facially sound cause of action, the defendant conclusively refutes that claim with extrinsic evidence, and the plaintiff then seeks to amend to raise new issues, and (2) a situation like this one, where the movant's attack really goes to the sustainability of the claim as pleaded and the plaintiff seeks the same leave to amend that would be granted routinely upon sustaining any other challenge to the pleadings. In the former situation there may be compelling reasons to require the pleader to make an explicit request to amend, if not a formal motion, in order to make an adequate record and preserve the issue for appeal. In the latter situation there are equally strong reasons to hold to the contrary, including considerations already mentioned in the text, as well as the undesirable effect on orderly procedure of rewarding parties who sit on their objections to an opponent's pleadings until the late stages of the litigation.

survive defendant's facial attack. We reject any suggestion that a party whose pleading suffers a challenge in the guise of a motion for summary judgment may only amend upon formal motion to do so. As we have stated, a motion for summary judgment that attacks the complaint on its face is in effect a motion for judgment on the pleadings, which in turn is, in effect, a belated general demurrer. (*People v. $20,000 U.S. Currency* (1991) 235 Cal.App.3d 682, 691, quoting, 2 Cal. Civil Procedure Before Trial (Cont. Ed Bar 3d ed. 1990) § 34.3, p. 34-4 [" 'A motion for judgment on the pleadings is basically a general demurrer, except that there are no time constraints' "].) By statute, the denial of leave to amend when sustaining a demurrer may be challenged on appeal notwithstanding a complete failure to raise it in the trial court. (Code Civ. Proc., § 472c.) The same rule applies to judgment on the pleadings. (*MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 816.) In essence the party opposing such a motion is deemed to have made an unsuccessful request for leave to amend. Or to put it another way, the opportunity to amend cannot be waived by silence, but only by some affirmative indication that the pleader elects to stand on his or her pleading as an adequate statement of the claims asserted.

Defendants also contend that had the court treated the motion as one for judgment on the pleadings, it would have properly denied leave to amend because any amended complaint would also be preempted by ERISA. They thus invoke the principle that when a pleading is attacked on its face, leave to amend is properly denied if the record establishes that the deficiencies identified in the motion cannot be cured by amendment. (See *Wood v. Riverside General Hospital*, *supra*, 25 Cal.App.4th at p. 1120 [where evidence conclusively showed failure to comply with claims statute, "no purpose would be served in returning the case to the court below only to have the pleadings amended and, thereafter to have a renewed motion for summary judgment granted"].) Contrary to defendants' argument, however, this record fails to establish the predicate for this rule, i.e., that an amended complaint would fall to ERISA preemption.

The amendment plaintiff might most obviously make would be to explicitly plead a false or broken promise to provide her with disability benefits comparable to those she gave up in accepting defendants' employment offer. Contrary to defendants' implicit contention, the record does not show that there was ever a disability benefit plan covered by ERISA. The record shows only that after plaintiff's injury defendants made a series of payments under what they chose to characterize as a "plan." Plaintiff in turn characterizes these payments as a "one-time obligation" that was "based on a fixed, one-time-only calculation." Such a record is hardly sufficient to establish that defendants ever "established or maintained" a disability benefits plan covered by ERISA. (See 29 U.S.C. § 1002(1) [ERISA plan as one "established" or "maintained" by employer]; *Anderson v. UNUM Provident Corp.* (11th Cir. 2004) 369 F.3d 1257, 1265 ["in order to establish the plan, [the employer] would not only have to set up the UNUM Plan, but have an 'expressed intention . . . to provide benefits on a regular and long term basis' "].)

Plaintiff also asserts without contradiction that another potential defense against preemption is suggested, if not established, by the deposition testimony of William Tarbox, which plaintiff secured only after the trial court had entered its order granting summary judgment.[8] Tarbox testified that at the time of plaintiff's accident, there was a disability benefit in place for European employees but not for American employees, and

[8] Plaintiff argues separately that the trial court abused its discretion by refusing a postponement of the summary judgment motion to permit plaintiff to conduct the deposition of Tarbox. Our resolution of other issues renders this assertion of error moot, but were we to reach the issue, we would have grave doubts about the sustainability of a ruling requiring a party to respond to a potentially dispositive summary judgment motion without the testimony of the principal actor in the matters complained of. The court apparently believed that plaintiff had forfeited the right to such a postponement by failing to take the deposition earlier. As the court said, "It seems to me that would have been the first person deposed . . . ." It is a common litigation practice, however—and one with obvious tactical advantages—to reserve the deposition of key witnesses until the later stages of discovery.

that after plaintiff's accident he asked corporate agents, apparently situated in Ireland, if it would be possible to "extend [this] corporate benefit" to American employees "until we could get our own benefit in place." He asserted that this request was successful in plaintiff's case, but that the "benefit" thus allowed was "run out of Deirdre's office in Dublin." As plaintiff contends, this testimony raises at least the strong possibility that even if the disability payments reflected an "employee benefits plan" for purposes of ERISA, it was a foreign plan exempt from regulation, and thus preemption. (See 29 U.S.C. § 1003(b)(4) ["The provisions of this subchapter shall not apply to any benefit plan if— [¶] . . . [¶] (4) such benefit plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens . . . ."]; *Pitstick v. Potash Corp. of Saskatchewan Sales Ltd.* (S.D.Ohio 1988) 698 F.Supp. 131, 134 [severance pay benefit from Canadian employer was exempt from ERISA where of 1,668 covered employees, fewer than 30 were U.S citizens]; cf. *Lefkowitz v. Arcadia Trading Ben. Pension Plan* (2d Cir. 1991) 996 F.2d 600, 602 [pension plans from Hong Kong employer were not exempt where U.S. citizen was only participant].)

Defendants assert that the testimony of Tarbox should be disregarded, either because it was only submitted after the court ruled on summary judgment, or because Tarbox "had only limited knowledge and information" about the payments. We reject the former point for many reasons, including that the question now is whether the complaint can be amended to plead a viable claim, not whether the record would otherwise have supported summary judgment. (See also, *ante* fn. 8.) We reject the second point because it goes only to the *weight* to be given Tarbox's deposition testimony, a point utterly irrelevant at present.

Of course it remains possible that the evidence will establish that ERISA bars all of plaintiff's claims and theories. Defendants offered no such evidence, however, with respect to disability benefits, relying instead on a reading of the complaint that confined

plaintiff to issues concerning medical benefits. It is impossible to conclude from this record that an amended complaint would have been an exercise in futility.

Finally we consider defendants' claim that an amended complaint would cause them prejudice. Leave to amend may of course be denied in the trial court's discretion where the record supports a finding of prejudicial, unjustified delay in seeking amendment. (See *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.) Here, however, there is no basis to conclude that the denial of leave to amend can be defended on this basis. First, in refusing to treat the motion as judgment on the pleadings, the trial court did not purport to exercise its discretion, but instead declared itself *unable* to so proceed. " '[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]' [Citation.] 'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]' [Citations]." (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392.)

The record here not only fails to reflect an exercise of discretion; it affirmatively indicates that if the court had exercised its discretion it would have granted leave to amend. In its ruling on plaintiff's motion for new trial, the court wrote, "If the complaint were insufficient, the Court would have and should have treated the motion as one for judgment on the pleadings," whereupon "[p]laintiff would be given leave to amend her complaint, rather than granting summary judgment."

Nor do we find anything in this record that supports a finding of prejudice on defendants' part. The only fact they offered on this subject was that the matter was scheduled for trial in about four months. They offered no evidence that this was too little time for them to meet an amended complaint. Nor could they claim surprise; well before the hearing on summary judgment, plaintiff had propounded interrogatories to

defendants, and they had propounded interrogatories to her, concerning disability benefits.

Even if some prejudice appeared it would have to be considered in light of defendants' own contribution to any delay in amending the complaint. It was well within defendants' power to raise their preemption defense by demurrer or by an earlier motion for judgment on the pleadings. Generally speaking, the courts of this state do not look with great sympathy upon claims of prejudice by a defendant who, without excuse or explanation, defers an attack on the complaint until late in the course of the lawsuit. (See *Nelson v. Nevel* (1984) 154 Cal.App.3d 132, 141 ["It may be reversible error to deny leave to amend to correct defects long known to the defendant and raised by him at the time of trial without giving the plaintiff an opportunity to elect to amend or stand on the pleadings"]; *id.* at p. 142 [abuse of discretion to deny leave to amend where defendant "withheld his objection regarding the statute of limitations until the day of trial"; such "delay in attacking appellant's defective pleadings earlier by general demurrer is said to be bad practice"]; *MacIsaac v. Pozzo*, *supra*, 26 Cal.2d at pp. 815-816 [where plaintiff moved for judgment on the pleadings at trial, defendant could not be faulted for failing to proffer amended answer "since there had been no demurrer and no intimation that any such attack would be made on the pleadings"]; *Olson v. Sacramento County* (1969) 274 Cal.App.2d 316, 329 [" '[W]here no demurrer was interposed it is error to grant the motion for judgment on the pleadings without giving the adverse party the same opportunity to amend that he would have had after the normal ruling on demurrer' "].)

The judgment before us cannot be sustained as a summary judgment, or as a judgment on the pleadings as to which leave to amend could properly be denied. Accordingly, the judgment must be reversed with directions to allow plaintiff a reasonable time to amend her complaint.

III. ***Preemption of Plaintiff's Other Claims***

Because our reversal will set the matter at large (see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 758, p. 783), it is not necessary to finally decide whether the trial court correctly determined that plaintiff's claims were preempted insofar as they rest on false promises of medical benefits equal to those plaintiff gave up by accepting employment with defendants. We note however our own doubt that this case is necessarily governed by the Ninth Circuit holding upon which defendants primarily rely. In *Olson v. General Dynamics Corp.* (9th Cir. 1991) 960 F.2d 1418 (*Olson*), the plaintiff alleged that he was injured when he accepted employment with a corporation upon its purchase from his then-employer of the product line in which the plaintiff was engaged. He asserted that he was induced to accept the later employment by a promise that he would be " 'in no way' " injured by doing so, and that on the " 'bottom line,' " he would " 'be equal or better to (*sic*) [his] present position.' " (*Id.* at p. 1419.) He sued his original employer, the acquiring employer, and its successor, alleging that "the benefits he received upon retirement from [the last employer] were less than he would have received had he retired from [the first employer]." (*Ibid*.) The court held that his claims "related to" an ERISA-governed benefit plan, and were thus preempted in their entirety. (*Id.* at p. 1422.)

Other federal authority, however, supports the opposite result. Thus in *Smith v. Texas Children's Hospital* (5th Cir. 1996) 84 F.3d 152, 153 (*Smith*), the plaintiff claimed that the defendants induced her to leave her old job "by promising more pay, a supervisory position, and the transfer of all of her employment benefits, including long-term disability benefits." She further alleged that after transferring to the new employer and falling prey to multiple sclerosis, she was denied disability benefits on the ground that her disease was a preexisting condition. (*Id.* at p. 154.) The court held that her claims were preempted by ERISA only to the extent that she was claiming an "entitle[ment] to disability benefits under [the defendant employer's] ERISA plan." (*Id.*

at p. 155.) Her claims were *not* preempted, and could proceed in state court, insofar as they sought recovery for "the benefits that she had at [the previous job] and relinquished by leaving." (*Ibid*.) "[T]o the extent that Texas law permits a plaintiff asserting fraudulent-inducement to recover for value relinquished in addition to value not received," the court wrote, "Smith may . . . have a claim based upon the disability benefits relinquished." (*Ibid*.)

The *Smith* court acknowledged that a claim based on a false promise to provide benefits equal to those provided by a previous employer poses some analytical "difficulty" in that the *measure of damages* (the loss occasioned by relinquishing the previous benefits) may be substantially identical to the measure that would apply if a contract action were brought on the promise to provide benefits—a claim that nearly all authorities agree would be preempted. (*Smith*, *supra*, 84 F.3d at p. 155.) The court refused to find that this arithmetic coincidence caused the plaintiff's claim to be "related to" the defendant employer's ERISA plan for purposes of preemption: "Smith alleges that, because she relied upon misrepresentations by Texas Children's, she lost a quantifiable stream of income that she would now be receiving had she never left St. Luke's. Such a claim escapes ERISA preemption because it does not necessarily depend upon the scope of Smith's rights under Texas Children's ERISA plan. For example, if Texas Children's did not have any benefits plan, ERISA would not apply, leaving Smith with a non-preempted claim based upon the benefits relinquished. That Texas Children's has such an ERISA plan does not alter the nature of her claim, which is based upon benefits given up for purposes of ERISA preemption. The ultimate question of Texas Children's liability for fraudulently inducing Smith to leave St. Luke's turns not on the quantum of benefits available at Texas Children's, but on the question whether Texas Children's misled Smith when it told her that she would keep what she had." (*Id.* at pp. 155-156; see *Marks v. Newcourt Credit Group, Inc.* (6th Cir. 2003) 342 F.3d 444, 453, [district court's finding of complete preemption was not justified by fact that

plaintiff sought damages equal to benefits he would have received under ERISA plan; "a close reading of Marks's complaint reveals that the reference to plan benefits was only a way to articulate 'specific, ascertainable damages' "].)

The viability of *Olson* is also cast in doubt by *Aetna Health Inc. v. Davila* (2004) ___ U.S. ___ [124 S.Ct. 2488] (*Aetna*), where the court held that ERISA preempts claims based on the denial of coverage for medical care if "the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan," and if the defendant's conduct violates "no legal duty (state or federal) independent of ERISA or the plan terms. . . . [Citation.] In other words, if an individual, at some point in time, could have brought his claim under ERISA [citation], and where there is *no other independent legal duty that is implicated by a defendant's actions*, then the individual's cause of action is completely pre-empted . . . ." (*Id*. at p. ___ [124 S.Ct. at p. 2496], italics added.) This principle required preemption there because the only actions complained of by the plaintiffs were the defendants' denials of coverage under an ERISA plan. (*Ibid*.) Here, in contrast, plaintiff asserts breach of a duty arising entirely independently of ERISA and of any plan defendants provided, or might have provided, under that Act: A common-law duty to refrain from false promises. The gist of a claim for fraud is not that the defendant broke a promise, thereby depriving the plaintiff of some benefit the defendant had undertaken to confer, but that by uttering a false promise the defendant induced the plaintiff to *give up something she already had*. To be sure, some California authority authorizes the victim of such a tort to recover both "benefit-of-the-bargain damages" and " 'out-of-pocket' damages." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 646.) But even if federal law preempts the former remedy—a debatable question, particularly in the wake of *Aetna Health*—it does not follow that it preempts the latter.

It is difficult to see what federal interest would be served by barring a defrauded worker's claim for a "loss of security and income associated with [the] former

employment" (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 646) brought about by a false promise of better benefits. Surely no one would seriously propose that ERISA preempts a worker's claim for fraud against a new employer who, by falsely promising to double the worker's salary, wooed her away from a job in which she was receiving ERISA-regulated benefits. Surely the worker's damages could include the value of the benefits thus lost, even if such recovery required examination of the terms of her old plan. It is difficult to conceive why a different result would obtain where the fraudulent inducement concerns benefits that, if provided, would be regulated by ERISA—at least where no attempt is made to enforce the promise thus made, but relief is instead limited to recovering the benefits formerly enjoyed but relinquished in reliance on the fraud.[9]

Our concurring colleague seems to take issue with us primarily on two points which, under scrutiny, merge into one. First he disagrees with our reading of the federal authorities, his own reading of which persuades him that plaintiff's claims are absolutely preempted by ERISA insofar as they rest on failure to provide a health plan as good as was promised. Second he disagrees that the matter will (or should) be "set at large" upon

---

[9] In view of our conclusion it is unnecessary to address plaintiff's argument that for ERISA to preempt her claims, it would have to appear that a relevant ERISA-covered plan existed *at the time of the alleged misrepresentations*. She asserts that not only was there no disability plan, then or ever, but that the Gold Plan did not yet exist, or was not yet in effect as to her, when she relied detrimentally on defendants' promises. We note at least some oblique federal support for such an argument. (See *Engelhardt v. Paul Revere Life Ins. Co.* (11th Cir. 1998) 139 F.3d 1346, 1352 [fraud claim against insurer preempted where, inter alia, employer's ERISA plan "had been established before, albeit only slightly before, [insurer] made its alleged misrepresentations"]; but see *Lion's Volunteer Blind Industries, Ind. v. Auto. Group Admin.* (6th Cir. 1999) 195 F.3d 803, 807 [discussing earlier decision in which "we noted that a number of district courts had declined to follow a strictly time-based test, and that several cases involving pre-plan activities had found preemption"].) We also note some basis to question whether Congress intended a rule that would permit an employer to insulate itself *after the fact* from liability for fraud by establishing a plan for benefits of the same general type as, though inferior to, those previously promised to hirees.

remand, concluding instead that plaintiff's claims should be disposed of now insofar as they are, in his view, preempted.

We have reached no hard and fast opinion about the ultimate application of ERISA to any of plaintiff's claims because the correct determination of that issue is far from clear and because given the state of the pleadings it is neither necessary nor appropriate to finally decide that issue now. When a general demurrer is sustained, all that has properly been determined is that the complaint *as pleaded* discloses some defect in the plaintiff's cause of action. We do not know whether plaintiff may be able to plead around the bar of ERISA preemption with respect to her claims based on health benefits. We know only that she can quite likely plead around ERISA with respect to disability benefits. Given that she is entitled to amend for that purpose, there is simply no reason to forbid her to re-plead her other causes of action. Such a result seems particularly undesirable given that the federal authorities appear to be in disagreement with one another, a significant quantum of authority favors plaintiff's claims, and recent Supreme Court authority suggests that lower courts have overstated the reach of ERISA preemption.

DISPOSITION

The judgment is reversed with directions to set aside the order granting summary judgment and issue in its place an order granting judgment on the pleadings with leave to amend. Appellant will recover her costs on appeal.

_____

RUSHING, P.J.

I CONCUR:

_____

McADAMS, J.

Mihara, J., concurring and dissenting.

While I agree with the majority that the trial court abused its discretion in failing to treat the summary judgment motion as a motion for judgment on the pleadings, I write separately because I disagree with much of the analysis in the majority opinion.

Plaintiff Lily Kephart left her old job for a new job with a new employer. Her new employer allegedly convinced her to leave her old job for the new job by telling her that her medical and health benefits at the new job would be better than her medical and health benefits at the old job. They were not. Six months after taking the new job, Kephart was seriously injured in an automobile accident. She was rendered a quadriplegic and incurred substantial expenses not covered by the medical and health benefits at the new job that would have been covered by the medical benefits at the old job. Kephart sued her new employer for breach of contract and misrepresentation.[1] Her new employer obtained summary judgment on the ground that her causes of action were preempted by the federal Employee Retirement Income Security Act (ERISA).

On appeal, Kephart claims that her causes of action were not preempted by ERISA. I conclude that, although her claims, as pleaded in her complaint, were preempted by ERISA, the superior court erred in refusing to treat the summary judgment motion as a motion for judgment on the pleadings, which would have resolved the preemption issue in favor of her new employers, Century II Staffing and Flextronics, but given Kephart the opportunity to amend her complaint to allege causes of action that were not preempted.

[1] Her complaint alleged five causes of action: breach of an oral contract; breach of the implied covenant of good faith and fair dealing; intentional misrepresentation; negligent misrepresentation; and fraud.

I. Background

A. Kephart's Allegations in Her Complaint

Kephart was originally employed by Skyway Freight Systems, Inc. (Skyway). Defendants recruited her to leave Skyway and come to work for them. She told defendants that she would come to work for them only "if defendants would provide medical benefits for Ms. Kephart and her family, that were the same as, or better than those provided to her through Skyway." Defendants' agent William Tarbox "promised Ms. Kephart that defendants would provide her with medical [and health care] benefits that were the same as, or better than those provided her through Skyway."[2] Kephart relied on this promise, left her employment with Skyway and came to work for defendants.

Kephart subsequently learned that the "medical and health care insurance" provided by defendants "did not have the same benefits" as she had enjoyed at Skyway. Tarbox and defendants "reaffirmed their commitment to provide her with medical benefits that were the same as or better than those provided to her at Skyway." They failed to do so. Kephart thereafter suffered serious injuries in an automobile accident that rendered her a quadriplegic, and she "requires constant and continuing medical care." Her "extensive medical bills" were not covered by the insurance provided by defendants.

---

[2] In her cause of action for negligent misrepresentation, Kephart alleged that Tarbox had "promised Ms. Kephart that defendant would provide her with the same or better benefits at [defendants] than those she was receiving at Skyway." This generalized reference to "benefits" was preceded and proceeded by specific references to "medical benefits" that formed the gravamen of the allegations for which she sought relief on this cause of action. Her fraud and breach of the implied covenant causes of action incorporated by reference the allegations in the negligent misrepresentation cause of action, but each of these causes of action too referred solely to "medical benefits" as the basis for the relief she sought.

B. Defendants' Summary Judgment Motion

Defendants moved for summary judgment on the ground that Kephart's causes of action were all preempted by ERISA. They relied on *Olson v. General Dynamics Corp.* (9th Cir. 1991) 960 F.2d 1418. Defendants' motion was supported by the following evidence.

When Kephart worked for Skyway, her benefits included a medical plan and short and long term disability plans. On April 13, 1999, Tarbox sent Kephart a written offer of employment in which he stated that, if she accepted defendants' offer of employment, she would be "eligible to participate in our medical, life, AD&D, dental, vision and 401(k) plans." Tarbox's letter said "[y]ou will participate at our highest level of benefits—the Gold Plan." Tarbox's letter also noted that he had attached to the letter a "summary of these benefits . . . for your review." A "Major Medical Benefits Summary" of the "Gold Plan" was attached. It clearly stated that the "Lifetime Plan Maximum" was $1,000,000 and that the Gold Plan generally covered 80% of medical bills. Summaries of dental, vision and life insurance benefits were also attached to the letter.

The next day, Kephart accepted the offer and completed an enrollment form for the medical plan. She began her employment on April 19, 1999. Kephart's direct employer was Century II Staffing (Century II). Century II "leased" her to the company now known as Flextronics for whom she actually worked.[3] The agreement between Century II and Flextronics required Century II to provide "medical coverage" for the leased employees.[4] On April 22, 1999, Flextronics signed an addendum to the lease agreement with Century II selecting the "Gold Program" medical plan for the leased

[3] The company name has changed since Kephart worked for it. I will refer to it as Flextronics, its current name.

[4] Kephart treats both Century II and Flextronics as her employers, and she does not contend that Flextronics was not her employer for ERISA purposes.

employees. The "Gold Plan" was an ERISA plan. Century II's vice-president declared that Century's II's "Gold Plan" was "in effect" "[b]efore" Kephart became employed by Century II.

C. Continuance Request

The summary judgment motion was set for hearing on January 14, 2003. On December 23, 2002, Kephart's attorney filed an ex parte application to continue the hearing until after Tarbox's scheduled January 22, 2003 deposition. Kephart's attorney declared that he had tried to schedule the Tarbox deposition for early December but had been unable to select a date that was acceptable to everyone. January 22, 2003 was the date that everyone agreed to. He claimed that Kephart could not "effectively oppose" the summary judgment motion without Tarbox's deposition.

Defendants opposed the continuance request. They noted that Kephart had agreed in October 2002 to the January 14, 2003 hearing date and yet had made no attempt to schedule the Tarbox deposition until late November 2002. The ex parte application was denied without prejudice to renewal before the judge hearing the motion.

D. Kephart's Opposition

In Kephart's points and authorities in opposition to the summary judgment motion, she argued that ERISA preemption was inapplicable because Tarbox's representations were made before the selection of the ERISA plan and before it took effect. Kephart also asserted that her claims related to benefits other than the medical plan including the "disability benefit," which was not part of an ERISA plan. She claimed that, under a liberal construction of the complaint, her claims extended to benefits other than the medical plan. Kephart also renewed her request to continue the hearing on the motion on the ground that she had not had a reasonable opportunity to conduct necessary discovery.

The only evidence Kephart submitted in opposition to the summary judgment motion was her declaration and a memo from Century II to Flextronics dated March 24, 1999 indicating that Flextronics had not yet selected a medical plan.

Kephart's declaration stated that she had conversations with Tarbox "[i]n late March or early April 1999" during which Tarbox told her that, if she came to work for him, her benefits would be "as good as or better than those I had at Skyway." Tarbox did not, however, mention any "specific benefits." After she began her employment with defendants, Kephart reviewed the "Plan Document" regarding her benefits and realized that the benefits were not as good as those she had at Skyway. Defendants' medical plan's "network of doctors was limited," and it had a lifetime maximum of $1,000,000 in contrast to the unlimited maximum under the Skyway medical plan. Defendants also did not offer short or long-term disability benefits.

Kephart told Tarbox of these "discrepancies and deficiencies," and he agreed to "try and find a new benefit plan that would provide better benefits" and to "attempt to improve the benefits." This had not been accomplished at the time of the October 1999 accident that rendered her a quadriplegic. Although she received medical benefits under the Gold Plan, she incurred substantial medical bills and lost income that were not covered by insurance. A month after Kephart's accident, defendants agreed to pay her "a disability benefit" of six months of her full salary, six months of two-thirds of her salary and one year of one-half of her salary.

E. Defendants' Reply

Defendants' reply to Kephart's opposition pointed out that her complaint was limited to "medical and health care benefits" and did not allege anything about any other benefits such as "disability" benefits. They noted that Kephart had made no attempt to amend her complaint and that they would be prejudiced by an amendment at this late stage since trial was set for less than four months after the hearing on the summary

judgment motion. Defendants also reiterated their opposition to a continuance of the hearing on the motion. They emphasized that the case had been pending for 14 months and Kephart had had ample opportunity to depose Tarbox earlier. Defendants lodged written objections to the evidence upon which Kephart's opposition was based.

F. Hearing on Motion

At the hearing on the summary judgment motion, Kephart's attorney argued that there were disputed factual issues about "other benefits promised to her that had nothing to do with ERISA plans." He also responded to the defense assertion that benefits other than medical and health benefits were not within the scope of the complaint. "[T]here's some suggestion that our Complaint isn't as clear as it might be. If the Court's concerned about that suggestion, I think this motion should be treated as a motion for judgment on the pleadings." The court responded "I can't do that" and took the matter under submission while indicating that it was inclined to grant the motion.

G. Ruling on Motion

Ten days after the hearing, the court issued a written decision granting the summary judgment motion. It declined to rule on the evidentiary objections. The court found that Kephart's claims "relate to" an ERISA plan and therefore were preempted by ERISA. On February 10, 2003, the court entered judgment for defendants.

H. New Trial Motion

On March 5, 2003, Kephart moved for a new trial. She asserted that the court had erred in refusing to treat the summary judgment motion as a motion for judgment on the pleadings and in refusing to continue the hearing to allow her to conduct additional discovery. Kephart also contended that the "new evidence" she had obtained during the January 2003 Tarbox deposition justified denial of the summary judgment motion. She

submitted excerpts from Tarbox's deposition in support of her motion. Tarbox had testified at his deposition that the disability payments to Kephart after her accident had come from Flextronics's headquarters "in Dublin." Tarbox had denied having promised Kephart that her benefits would be as good as they had been at Skyway. He asserted that the only promises he made were those reflected in the offer letter he sent to Kephart with the attached summary of benefits.

At the hearing on Kephart's new trial motion, the court asked Kephart's attorney why Tarbox's deposition had not been taken earlier. Kephart's attorney responded "Mr. Tarbox's deposition simply was not taken [earlier]. I have no other answer to give the Court." He conceded that he had "no thought" of taking Tarbox's deposition until he received the summary judgment motion containing Tarbox's declaration.

The court denied the new trial motion and again entered judgment against defendants. Kephart filed a timely notice of appeal.

II. Discussion

On appeal, Kephart contends that (1) the court erred in denying her a continuance, (2) her causes of action were not preempted by ERISA, (3) there were triable issues regarding disability benefits and (4) the trial court abused its discretion in refusing to treat the summary judgment motion as a motion for judgment on the pleadings.

A. Denial of Continuance

Kephart asserts that the trial court erred in denying her request for a continuance of the summary judgment hearing to permit her to obtain further discovery. Kephart relies on Code of Civil Procedure (CCP) section 437c, subdivision (h). "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a

continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." (CCP, § 437c, subd. (h).) A continuance is required only if the party requesting a continuance establishes by affidavit: "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts."[5] (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623.)

The affidavit in support of Kephart's continuance motion asserted that she could not effectively oppose the summary judgment motion until after she took Tarbox's deposition on January 22, 2003 and received responses to a set of special interrogatories due on January 2, 2003. Her attorney declared that Tarbox's deposition testimony would show "for whom Tarbox was working when the promises were made, whether Tarbox had the ability to bind defendants with his promises, what benefits were promised to plaintiff, and exactly when the relevant benefit plans at issue came into effect." Kephart's attorney also declared that the special interrogatory responses would show "what plans [defendants] considered to be governed by ERISA, who was an administrator for the plans they identified, and who was a fiduciary for these plans."

The court did not err in denying Kephart's continuance request because the "facts" that her attorney claimed were essential to her opposition were actually irrelevant to the issues raised in defendants' motion. Defendants' motion was based solely on their assertion that ERISA preempted Kephart's claims. The nature of Kephart's claims was set forth in her complaint. It was undisputed that the "Gold Plan" was an ERISA plan.

---

[5] It is questionable whether lack of diligence alone may justify denial of a continuance request under CCP section 437, subdivision (h). (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398.) We need not address that issue because Kephart failed to satisfy the other requirements.

The sole issue before the trial court was whether Kephart's claims "relate[d] to" the Gold Plan within the meaning of ERISA's preemption language.

Tarbox's deposition testimony was not essential to opposing the motion. The preemption issue did not depend on the identity of Tarbox's employer or the scope of Tarbox's authority.[6] It was Kephart's complaint, not Tarbox's deposition testimony, that framed the issue of what "benefits were promised" to Kephart, and her complaint explicitly alleged that the promise at issue was that the Gold Plan would be equal to or better than her Skyway medical benefits. Whether Tarbox confirmed or denied her allegations did not affect the nature of her claim. Precisely when the Gold Plan took effect was also not relevant to the preemption issue. Kephart's claim depended on the discrepancy between what she had been promised and the Gold Plan. The alleged promise necessarily preceded her coverage by the Gold Plan, but the alleged breach of promise necessarily occurred when she became covered by the Gold Plan. If her claims "relate[d] to" the Gold Plan, they did so regardless of when the Gold Plan took effect. Nor were the special interrogatories pertinent to her opposition. Kephart's complaint was directed solely at the Gold Plan, so there was no uncertainty as to what plan was at issue. It was undisputed that the Gold Plan was an employee benefit plan covered by ERISA, and Kephart has never suggested that there were any *material* factual issues as to the administrator or fiduciary of the Gold Plan.

Kephart's continuance request was premised on her need for discovery of information that was irrelevant to the issues before the court on defendants' motion. Consequently, the court correctly concluded that she had failed to establish that a continuance was necessary to obtain evidence essential to her opposition. The court's denial of her continuance request was not erroneous.

---

[6] Tarbox is not a defendant in this action.

B. Preemption

The primary issue in this appeal is whether defendants established that Kephart's causes of action were preempted by ERISA. The "starting presumption" in addressing a claim of federal preemption is "that Congress does not intend to supplant state law." (*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (*Travelers*) (1995) 115 S.Ct. 1671, 1676.) It is only where Congress clearly intended to supplant state laws that preemption may be found. (*Travelers* at pp. 1676-1677.)

"[ERISA] does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans, as by imposing reporting and disclosure mandates, participation and vesting requirements, funding standards, and fiduciary responsibilities for plan administrators. It envisions administrative oversight, imposes criminal sanctions, and establishes a comprehensive civil enforcement scheme. It also pre-empts some state law. [¶] Section 514(a) provides that ERISA 'shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan' covered by the statute . . . ."[7] (*Travelers* at pp. 1674-1675, citations omitted.)

The mere words of the preemption provision are ambiguous since they may be interpreted broadly, narrowly or somewhere in between. Therefore, it is necessary to look to the underlying purpose of ERISA so as to elucidate what it was that Congress intended to preserve by way of this preemption provision. (*Travelers* at p. 1677.) "Congress intended to ensure that [ERISA] plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial

[7] Under ERISA, "[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." (29 U.S.C. § 1144, subd. (c)(1).) Thus, a state common law cause of action falls within the preemption provision if it "relate[s] to" an ERISA plan. (*Olson*, *ante*, at p. 1420.)

burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." (*Travelers* at p. 1677, internal quotation marks omitted.)

"The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." (*Travelers* at pp. 1677-1678.) ERISA has been found to preempt state laws "that mandated employee benefit structures or their administration" or "provid[ed] alternative enforcement mechanisms." (*Travelers* at p. 1678.) But ERISA preemption is not that limited. "Congress's extension of pre-emption to all 'state laws relating to benefit plans' was meant to sweep more broadly than 'state laws dealing with the subject matters covered by ERISA[:] reporting, disclosure, fiduciary responsibility, and the like . . . .'" (*Travelers* at p. 1680.) The fact that ERISA provides no remedy does not mean that ERISA preemption does not apply. (*Hollingshead v. Matsen* (1995) 34 Cal.App.4th 525, 532.)

Travelers is the foundation of Kephart's argument, but it is difficult to find any support for her position in it. *Travelers* did not precisely define the scope of ERISA preemption, but it did clearly state that ERISA preemption reaches *more than* just the "subject matters covered by ERISA." Hence, it cannot simply be said that Kephart's claims are not preempted because she had no remedy under ERISA or because she framed her claim as one for fraud and breach of contract. A far more subtle issue must be resolved. And *Travelers* is not particularly helpful in resolving it because the factual situation in *Travelers* was not remotely similar to the one here. The U.S. Supreme Court's conclusion that preemption did not apply to the facts in *Travelers* provides no significant clues to determining whether ERISA preemption applies to the facts here. Guidance must be derived from cases that are factually similar to Kephart's case.

One such case is *Olson v. General Dynamics Corp., supra,* 960 F.2d 1418. In *Olson*, the employer told the plaintiff that his new position would be equal to or better than his old position. (*Olson* at p. 1419.) However, the retirement benefits in the new position turned out to be worse than those in the old position. (*Olson* at p. 1419.) The plaintiff brought a fraud action in California state court against his employer. The employer removed the action to federal court and obtained summary judgment on the ground that the fraud cause of action was preempted by ERISA. (*Olson* at pp. 1419-1420.) On appeal, the Ninth Circuit found the application of ERISA preemption to these facts "straightforward" and "inexorable." (*Olson* at p. 1421.) It declined to limit ERISA preemption to causes of action aimed at the administration of an ERISA plan or to causes of action for which ERISA provided a remedy. (*Olson* at pp. 1421-1423.)

Kephart claims that *Olson* is no longer good law after *Travelers* because *Olson* was based on pre-*Travelers* U.S. Supreme Court cases that endorsed more expansive ERISA preemption than *Travelers* countenanced. While *Travelers* may have stemmed the expansion of ERISA preemption, both before and after *Travelers* ERISA preemption has been held to encompass claims like Kephart's action. *Olson* is but one example of the pre-*Travelers* case law. There is post-*Travelers* case law to the same effect.

In *Franklin v. QHC of Gadsden, Inc.* (11th Cir. 1997) 127 F.3d 1024, the prospective new employer promised that it would provide Franklin with equivalent medical benefits if she left her old employer and accepted its offer of employment. She did so, and the benefits eventually turned out to be inferior. Her state action for fraud was removed to federal court, and the employer obtained summary judgment on the ground that Franklin's action was preempted by ERISA. (*Franklin* at pp. 1025-1028.) The Eleventh Circuit explicitly cited and relied on *Travelers* in affirming the district court's preemption finding. (*Franklin* at p. 1028.) The court noted that a consideration of the merits of Franklin's action would require a comparison of the benefits offered

under two ERISA plans. It naturally followed that Franklin's action "relate[d] to" an ERISA plan. (*Franklin* at p. 1029.)

Kephart claims that these cases are not pertinent because her action was based on representations made *before the Gold Plan existed*. She argues: "It stretches logic to allege that appellant's claims relate to a plan, when that same plan was not in effect until after appellant had been hired." It was undisputed that Century II's Gold Plan *existed* when Tarbox made the alleged misrepresentations. Even if Flextronics was still considering selecting a more generous benefit plan at the time of Tarbox's representations, that would not eliminate the fact that Kephart's claims are at their core based on a comparison between the promised benefits and the Gold Plan benefits that she actually received. The Gold Plan was an existing ERISA plan when Tarbox made the alleged promises, and the timing of Flextronics's selection of the plan and Kephart's enrollment in the plan tells us nothing about whether Kephart's action is "relate[d] to" the Gold Plan.[8] In fact, her action is inextricably linked to the Gold Plan.

Kephart also attempts to dissuade us from relying on *Franklin*. She claims that cases decided by "different [federal] circuits will often have different interpretations of what a word or phrase means, [and therefore] their holdings have little value here." Since the question before us is one of federal preemption, it is natural to look to the federal courts that ordinarily decide such federal questions. The opinions of federal circuit courts on such issues are persuasive and entitled to "great weight," but they are not controlling and no particular federal circuit binds us. (*People v. Bradley* (1969) 1 Cal.3d 80, 86.)

---

[8] For these same reasons, I reject Kephart's claim that there were material triable issues of fact regarding when the Gold Plan took effect. Any issues of fact as to when the Gold Plan took effect were not material to the ERISA preemption issue that was the sole issue before the trial court on defendants' motion. The Gold Plan was indisputably in effect when Kephart's accident occurred, and her causes of action did not arise earlier since she had previously suffered no alleged damages.

Both the Ninth Circuit in *Olson* and the Eleventh Circuit in *Franklin* have held, in cases with very similar facts, that ERISA preemption applies to an action like Kephart's. These opinions are persuasive, and I cannot agree with Kephart that *Travelers* provides a basis for distrusting either of them. Nor is there merit in her attempts to factually distinguish these cases. The facts material to ERISA preemption in those cases are practically on all fours with the facts here.

Although the majority opinion holds that the trial court should have granted judgment on the pleadings based on ERISA preemption, it argues that Kephart's Gold Plan claims might not be preempted by ERISA. It relies on *Smith v. Texas Children's Hospital* (5th Cir. 1996) 84 F.3d 152. *Smith* does not persuade me that Kephart's Gold Plan claims are not preempted by ERISA. Smith's new employer told her that her benefits would be the same as they were at her old employer. She left the old employer for the new employer and was almost immediately diagnosed with multiple sclerosis. The new employer advised her that she would have no difficulty obtaining long term disability benefits if she ceased working. After she ceased working, she learned that she did not qualify for such benefits because her disability was a pre-existing condition that was not covered by the disability plan. The 5th Circuit held that her claim for the stream of income that she would have had from the disability benefits provided by her old employer was not preempted by ERISA. (*Smith* at p. 155.)

To a certain extent, *Smith* is factually distinguishable. Because Smith's disease would not have been a preexisting condition under her old employer's plan, she would have been entitled to benefits. Simply by changing employers she lost this benefit. Here, Kephart's change in employers alone did not create her loss. Her loss was a result of the differences between the Gold Plan and Skyway's health plan. In *Smith*, it was not necessary to compare two ERISA plans to determine Smith's loss. She received no disability benefits as a result of her new employer's fraud. Kephart, on the other hand, did receive some level of health benefits under the Gold Plan. Since it would be

necessary to compare the specific benefits offered by Gold Plan to those offered by Skyway's health benefits plan in order to determine Kephart's loss, her claims were "related to" the Gold Plan and therefore preempted by ERISA. In addition, I find the analysis in *Olson* and *Franklin* more persuasive than the analysis in *Smith*.

I also find nothing in *Aetna Health Inc. v. Davila* (2004) 124 S.Ct. 2488 (*Aetna*) to persuade me that Kephart's Gold Plan claims are not preempted. *Aetna* notes that "any state-law cause of action that duplicates, *supplements*, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." (*Aetna* at p. 2495, emphasis added.) *Aetna* did not involve the "relates to" ERISA preemption clause at issue here (29 U.S.C. § 1144, subd. (c)(1)). (*Aetna* at p. 2498, fn. 4.) The actual question addressed by the U.S. Supreme Court in *Aetna* was whether a claim by an individual against the administrator of an ERISA plan for failing to pay for medical care "arose under" ERISA and therefore was removable to federal court. (*Aetna* at pp. 2494-2495.) The court held that such a claim did arise under ERISA, and was therefore removable, because the administrator's only connection with the individual was its administration of the ERISA plan. (*Aetna* at pp. 2496-2497.) *Aetna* simply tells us nothing about the scope of ERISA's express "relates to" preemption clause with respect to a state law claim that "supplements" ERISA's civil enforcement remedies. Although I agree that the question is not without controversy, I would hold that Kephart's Gold Plan claims are preempted by ERISA.

C. Complaint Did Not Allege A Disability Benefits Cause of Action

Kephart claims that summary judgment was precluded because there were triable issues of fact regarding the application of ERISA to *disability* benefits provided by defendants. The problem with this contention is that Kephart's complaint made no allegations whatsoever regarding *disability benefits*. The allegations in her complaint

were expressly limited to "medical and health benefits." Kephart argues on appeal that her complaint must be "construed liberally" to encompass "other benefits she was promised." Not so.

"The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*. A moving party need not . . . refute liability on some theoretical possibility not included in the pleadings. [A] motion for summary judgment must be directed to the *issues raised by the pleadings*. The [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342, citations and quotation marks omitted, emphasis added.) "Declarations in opposition to a motion for summary judgment are no substitute for amended pleadings. If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, as opposed to merely attacking the sufficiency of the complaint, the plaintiff forfeits an opportunity to amend to state new claims by failing to request it." (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1664.)

Here, Kephart *never* actually requested leave to amend her complaint but instead attempted to create issues outside the pleadings in response to defendants' summary judgment motion. Kephart's initial contention regarding disability benefits occurred *in her opposition* to defendants' motion. She claimed then, as she does now, that a liberal construction of her complaint would extend her allegations to benefits other than the medical benefits specified in her complaint. Defendants challenged her assertion in their reply to her opposition, noted that she had not attempted to amend her complaint and asserted that they would be prejudiced by a late amendment. Still, Kephart did not seek leave to amend her complaint.

A defendant moving for summary judgment is only required to refute the allegations in the complaint. It would subvert the entire purpose of the summary

judgment procedure to require a defendant to address contentions outside the complaint. Kephart's complaint is not vague or ambiguous in this regard. All of its allegations are limited to "medical and health benefits," and it contains no allegations that could possibly be construed to extend to disability benefits.[9]

D. Refusal to Treat Motion As Motion For Judgment On The Pleadings

In her opposition to the summary judgment motion, Kephart asserted that her claims related to benefits other than the medical plan including the "disability benefit," which was not part of an ERISA plan. She produced evidence that Skyway had provided her with a disability plan, but defendants did not provide her with disability benefits. Instead, after her accident, defendants unilaterally decided to pay her "a disability benefit" of six months of her full salary, six months of two-thirds of her salary and one year of one-half of her salary. These payments were inferior to the disability benefits offered by Skyway.

Acknowledging the possible inadequacy of the complaint with respect to disability benefits, Kephart's attorney requested that the court treat the summary judgment motion as a motion for judgment on the pleadings. Defendants argued that they would be prejudiced by an amendment since trial was set for less than four months after the hearing on the summary judgment motion. The court refused the request. Kephart renewed the issue in her motion for a new trial, but the court denied her motion.

In her appellate briefs, Kephart originally did not assert that the trial court erred in refusing to treat the motion as a motion for judgment on the pleadings. At this court's request, the parties submitted supplemental briefs addressing this issue.

[9] See footnote 2, *supra*.

"Where the complaint is challenged and the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend." (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067.) Where a summary judgment motion challenges only the sufficiency of the complaint and does not require the consideration of the evidence supporting the allegations, the motion may be treated as a motion for judgment on the pleadings and leave to amend granted. (*Taylor v. Lockheed Martin Corp.* (2000) 78 Cal.App.4th 472, 479) Hence, the first issue is whether defendants' summary judgment motion challenged the sufficiency of the pleadings or instead required the court to consider the evidence.

The trial court was not required to consider the evidence in deciding whether the allegations made by Kephart in her complaint related to an ERISA plan as asserted by defendants in their summary judgment motion. It is true that "[t]he existence of an ERISA plan is a question of fact, to be answered in light of all of the surrounding circumstances as viewed by a reasonable person [and that t]he burden is on defendants to prove facts necessary to establish the defense of ERISA preemption." (*Hollingshead v. Matsen* (1995) 34 Cal.App.4th 525, 533.) An ERISA plan is "(1) a plan, fund, or program (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, [and other specified] benefits (5) to participants or their beneficiaries." *(Ibid.)* A group medical insurance plan purchased by an employer to cover its employees is an ERISA plan. (*Id.* at pp. 533-535.)

While the existence of an ERISA plan is a question of fact, the allegations of Kephart's complaint established that the Gold Plan was an ERISA plan and therefore established ERISA preemption as a matter of law. She alleged that the Gold Plan was an employer-provided medical insurance plan covering employees. Since these allegations established the essential facts upon which defendants' summary judgment motion was

based, the trial court was not required to consider the evidence and could have treated the motion as a motion for judgment on the pleadings.

The next question is whether the trial court erred in refusing to do so. Defendants assert that the trial court did not abuse its discretion. The standard of review is abuse of discretion, but the context informs application of this standard here. "[O]n a motion for summary judgment, considerable liberality should be used by the trial court in allowing amendments which do not completely and entirely depart from the general area of the cause set up in the pleadings." (*Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 128.) A court's refusal to treat a summary judgment motion that challenges the sufficiency of the pleadings as a motion for judgment on the pleadings is akin to a court's refusal to grant leave to amend upon sustaining a demurrer because, in both instances, the defendant is challenging the sufficiency of the pleadings and the plaintiff is seeking an opportunity to remedy the insufficiency. It follows that a trial court abuses its discretion in refusing to treat such a motion as a motion for judgment on the pleadings if the plaintiff satisfies her burden of showing that there is a "reasonable possibility that the defect can be cured by amendment." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Kirby* at p. 1069; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663.)

Kephart's assertions regarding disability benefits do not "entirely depart from the general area of the cause set up in the pleadings," and there is a "reasonable possibility" that she can amend her complaint to sufficiently allege a cause of action that is not preempted by ERISA based on defendants' failure to provide disability benefits equivalent to those Kephart enjoyed at Skyway. Kephart's contentions regarding disability benefits, as described in her pleadings and declaration, are closely related to the allegations in her complaint. Kephart's opposition to defendants' summary judgment motion contains support for a conclusion that a reasonable possibility exists that she can allege a cause of action regarding disability benefits that is not preempted by ERISA.

Kephart's evidence indicates that she was promised that her benefits would be at least as good as those she had at Skyway. Yet her benefits at Skyway included disability benefits while no disability benefits were provided to her by defendants in advance of her accident. The unilateral salary replacement payments made by defendants after Kephart's accident were not equivalent to the benefits provided by Skyway, and there are at least triable issues of fact as to whether these payments can be properly characterized as part of an ERISA plan.

When a complaint is inadequate because it is missing allegations that could be added by amendment, "the trial court . . . *should* allow an opportunity to amend the complaint to include the missing allegations." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 5, emphasis added.) The trial court's refusal to treat the summary judgment motion as a motion for judgment on the pleadings was an abuse of discretion in this case because Kephart bore her burden of demonstrating that there was a reasonable possibility that she could amend her complaint to allege a disability benefits cause of action that would not be preempted by ERISA.

III. Remedy

The majority opinion's disposition does not differ greatly from the disposition that I favor. However, the majority suggests that its disposition of the case "will set the matter at large" and therefore "it is not necessary to decide" the preemption issue. I strongly disagree. The majority opinion directs the superior court to enter an order granting judgment on the pleadings with leave to amend. The sole basis for judgment on the pleadings is preemption. The majority opinion concludes that it was a pure question of law whether Kephart's pleaded causes of action were preempted. If Kephart's causes of action as pleaded were not preempted, defendants would not be entitled to judgment on the pleadings, it would not be necessary to reach the judgment on the pleadings issue and the appropriate disposition would be a reversal with directions to the superior court to

enter an order denying the summary judgment motion. The appropriate disposition, in my opinion, is a reversal of the judgment with directions to the superior court to vacate its order granting summary judgment and to enter a new order granting judgment on the pleadings on the ERISA-preempted Gold Plan causes of action with leave to amend to allege a disability benefits cause of action.

_____

Mihara, J.